## APPENDIX A

## IN THE SUPREME COURT OF VIRGINIA

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RECORD NO. 042023
CIRCUIT COURT NO. L201879

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MARIO A. BUSTILLO,
APPELLANT,

AGAINST

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
APPELLEE.

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Monday, March 7, 2005

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From the Circuit Court of Fairfax County

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Finding that the appeal was not perfected in the manner provided by law with regard to assignments of error nos. 1 through 5 because the appellant failed to file the habeas proceeding transcript(s), the Court dismisses the petition for appeal as to those assignments of error.

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of with regard to assignment of error no. 6. Accordingly, the Court refuses the petition for appeal as to that assignment of error.

Chief Justice Hassell took no part in the decision of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

/s/

Deputy Clerk

## APPENDIX B

[Judicial Seal Omitted]

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 246-2221 Fax: (703) 385-4432

COUNTY OF FAIRFAX

MICHAEL P. McWEENY
MARCUS D. WILLIAMS
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
LESLIE M. ALDEN
KATHLEEN H. MACKAY
JONATHAN C. THACHER
R. TERRENCE NEY
GAYLORD L. FINCH, JR.
RANDY I. BELLOWS

JUDGES

CITY OF FAIRFAX

BURCH MILLSAP
BARNARD F. JENNINGS
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH

RETIRED JUDGES

May 4, 2004

Stephen McCullough, Esquire
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

John C. Kiyonaga, Esquire
526 King Street, Suite 213
Alexandria, Virginia 22314

Re: *Mario Bustillo v. Gene M. Johnson*, At Law No. 201879

Dear Counsel:

Pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief, this matter came before the Court on April 7, 2004 for a limited evidentiary hearing on the issue

of materiality with respect to certain exculpatory evidence the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

## FACTS

On December 10, 1997 James Merry ("Merry") was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998 Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

After exhausting all of his appeals, Bustillo filed a Petition for a Writ of Habeas Corpus asserting, among other things, that the Commonwealth failed to disclose exculpatory evidence.[1]

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required to determine whether the Commonwealth possessed at the time of trial a photograph and videotaped confession of "Sirena," an individual who the defense said was responsible for the crime, and, if so, whether such evidence was exculpatory in nature.[3]

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[1] In his Petition for Habeas Relief, Bustillo also alleged that the Commonwealth engaged in improper and suggestive witness coaching; threatened and intimidated witnesses in exchange for incriminating testimony; failed to inform Petitioner of his Vienna Convention rights; had improper contact with a member of the jury; and prejudicially promoted Petitioner's alleged "gang" affiliation at trial. In addition, Bustillo claimed ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002 evidentiary hearing.

[3] The Petition with respect to all other issues raised was denied.

The evidentiary hearing was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[4] made by Bustillo. Pursuant to the discovery orders,[5] the Commonwealth produced a photograph of "Sirena", a copy of Detective Cline's notes of an interview with one Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C.J. Mahoney's ("Mahoney") investigative report dated December 10, 1997 documenting his stop of an individual named Julio Osorto.[7] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, after finding no evidence that the Commonwealth possessed either a photograph or videotaped confession of Sirena at the time of trial, the Court denied the Petition for a Writ of Habeas Corpus.[8]

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[4] See this Court's Orders dated October 2, 2002 and November 15, 2002.

[5] *Id.*

[6] According to Detective Cline's notes dated January 7, 1998 Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. #3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997 contain the following notation: "Sirena – Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on evidence furnished by virtue of the Court's 2002 discovery orders,[9] in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On September 16, 2003 the Court granted Bustillo's Motion to Reconsider, finding that the information contained in Detective Cline's notes – in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cock[ed]" bat,[11] and the note documenting the Chelsea Square Apartment address,[12] – and the information contained in Officer Mahoney's Report – which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission – were exculpatory in nature and therefore should have been disclosed to the defense prior to trial.

With respect to the issue of materiality, the Court declined to set aside the verdict and order a new trial absent further evidence as to the probability that, had the evidence been disclosed to the defense, the result of the criminal trial might have been different.

A limited hearing on the issue of materiality was held on April 7, 2004.

## ANALYSIS

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irre-

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[9] See note 4, *supra*.

[10] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Jose Armando Amaya dated January 7, 1998.

[12] *Id.* See also note 39, *infra*.

spective of the good faith or bad faith of the prosecution.[13] Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[14]

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome."[15] Thus, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[16] Rather, a petitioner has the burden of showing that when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt.[17]

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[13] *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[14] *Id.*, citing *United States v. Bagley*, 473 U.S. 667 (1985). In addition, evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Soering*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919). Only when the proffered evidence tends to clearly point to some other person as the guilty party will such proof be admitted. *Id.*

[15] *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668 (1984). In further defining the materiality standard, the *Strickland* Court explained that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

[16] *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528 citing *United States v. Agurs*, 427 U.S. at 109-110.

[17] *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v.*

In addition, the Court – in addressing the materiality of exculpatory evidence on habeas review – may consider what defense counsel could have done or might have done differently had the evidence been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury.[18]

In support of the materiality of Detective Cline's notes and the Mahoney Report, Bustillo called four witnesses to testify about the presence of Sirena and/or blood spatter at the crime scene, matters which purportedly would have been further explored at trial and might have led to a different outcome had the Commonwealth disclosed the evidence to the defense.

*Dr. Peter Bernad*

Dr. Peter Bernad ("Dr. Bernad"), a licensed neurologist who reviewed Merry's autopsy report and treatment records in preparation for the April 7, 2004 hearing,[19] described Merry's injuries as severe blunt trauma to the left side of the head, multiple fractures, and destruction of bone and blood vessels.[20]

Dr. Bernad further testified that the blow to Merry's head likely resulted in a ruptured eardrum, thus allowing blood to "seep" out of the left ear canal.[21] With respect to time involved, Dr. Bernad explained that the blood would have had "significant velocity" to push through the tym-

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*Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990).

[18] *William Evans-Smith v. John B. Taylor*, 30 Va. Cir. 116 (Loudon County Circuit Court, 1993).

[19] Dr. Frances Field, not Dr. Bernad, was the medical examiner who performed the autopsy of Merry in 1998.

[20] See testimony of Dr. Peter Bernad, April 7, 2004.

[21] *Id.*

panic membrane and exit the ear, and that given the injury sustained, bleeding would have occurred "almost immediately" after impact.[22]

On cross-examination, however, Dr. Bernad testified that he was not an expert on blood spatter.[23] In addition, he conceded that while blood may have aerated from the ear immediately upon impact, it was also possible that given such an injury, it could have taken a couple of seconds for blood to "seep" from the ear.[24] Moreover, Dr. Bernad testified that Merry's injury would not have produced a significant amount of bleeding.[25]

In reviewing Dr. Bernad's testimony in light of the existing record, including the crime scene photos, the prior testimony of the Commonwealth's expert regarding Merry's injuries,[26] and the prior testimony of several eyewitnesses,[27] his testimony fails to give rise to a reasonable doubt with respect to the nature of Merry's injuries and the closed head wound evidence shown by the Commonwealth.

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] At the 1998 trial, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98 p. 193. Dr. Frances Field further testified – consistent with Dr. Bernad's testimony – that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear and then out of the ear canal. Tr. 3/17/98 p. 193.

[27] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98 p. 131 (Michelle Guiterrez; Tr. 3/18/98 p. 222 (Jesse Konstanty); Tr. 3/18/98 p. 264 (Nicholas Parada); Tr. 3/18/98 p. 27 (Valeria Landaeta); Tr. 3/18/98 p. 100, 111 (Amilcar Amaya); Tr. 3/18/98 p. 142 (Christina Hondoy).

Notwithstanding Dr. Bernad's testimony that blood would have "sprayed/aerated" from the victim's ear at some point upon or almost immediately after impact, the crime scene photos revealed no signs of blood "spray," "spatter" or droplets, but rather only a few sizable drops of blood, the latter of which the Court finds consistent with blood seepage, not blood spatter.

*Yahayra Quierola*

Yahayra Quierola ("Quierola"), purportedly present at the Popeye's Restaurant the night Merry was attacked,[28] testified that upon hearing a "noise," she turned and saw blood on Merry's face and ears.[29] She further testified that her friend "Christina," also present at the scene, had droplets of blood on her shirt after the attack.[30]

On cross-examination, Quierola testified that she saw blood coming from Merry's ears only, in contradiction to a prior statement she made under oath that she saw "blood explode from [Merry's] ears, nose and throat."[31] In addition, Quierola could not recall when or how quickly the blood began to "spurt" from Merry's ears.[32]

The Court does not find Quierola's testimony either persuasive much less dispositive on any issue of materiality with respect to either Detective Cline's notes or the Mahoney Report.

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[28] Quierola did not testify at the 1998 trial. At the post-trial hearing hearing held on July 13, 1998, she identified a photo of Sirena and testified that he "looked like the assailant."

[29] See testimony of Yahayra Quierola, April 7, 2004.

[30] *Id.*

[31] *Id.*

[32] *Id.* Interestingly, only this witness testified to observing blood coming from *both* of Merry's ears.

*Amilcar Amaya*

Next, Amilcar Amaya ("Amaya") testified that he saw Julio Osorto a/k/a Sirena strike Merry with a baseball bat,[33] and that upon impact, he observed blood spray "in the direction of" and "over" Sirena.[34]

The Court does not find Amaya's testimony credible. First, although Amaya testified that he saw blood spray toward Sirena upon impact – suggesting that it was on Sirena's shirt – Amaya later clearly testified that he did *not* observe any blood on Sirena's shirt.[35]

Second, Amaya's testimony is inconsistent with his prior testimony. Neither at the 1998 trial nor in his post-trial affidavit(s) did Amaya testify about the presence of blood at the moment of impact.[36]

Absent credible testimony regarding the presence of blood on Sirena's shirt, the materiality of Mahoney's Report is wanting. In addition, although Detective Cline's notes – which reference "Sirena" – corroborate Amaya's testimony regarding Sirena's presence at the scene, they also place *Bustillo* at the scene, a fact plainly at odds with his alibi defense. As a result, the Court finds that Bustillo fails to demonstrate a reasonable probability that, but for the Commonwealth's nondisclosure of the notes, the result of the proceeding would have been different.[37]

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[33] See testimony of Amilcar Amaya, April 7, 2004. At the 1998 trial, Amaya testified that he was outside the Popeye's when he saw "Senior Julio" *also known as "Sirena"* take a bat and strike the victim. See testimony of Amilcar Amaya, Tr. 03/18/98 p. 99, 100-101, 110-111.

[34] See testimony of Amilcar Amaya, April 7, 2004.

[35] *Id.*

[36] See note 41, *infra*.

[37] The Court also notes that in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a. "Sirena", the jury would still have to disregard the substantial

*David Bernhard*

Lastly, David Bernhard ("Bernhard"), Bustillo's defense attorney at trial, was called to testify about possible defense strategies that might have been employed had the Commonwealth produced Detective Cline's notes and the Mahoney Report.

During the 1998 trial, the defense, relying primarily on an alibi defense, also argued that someone other than Bustillo, namely "Sirena", a.k.a. Julio, had struck and killed Merry.

In addressing the materiality of the undisclosed evidence, Bernhard testified that he was "shocked" to learn of the existence of Detective Cline's notes and the Mahoney Report because both tended to corroborate the existence and presence of Sirena at or near the crime scene shortly after the attack.[38] Bernhard further testified that had he possessed the exculpatory documentation at the time of trial, he likely would have called Officer Mahoney to testify

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evidence presented at the 1998 trial that Bustillo was the assailant. For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrez testified that both "Sirena" and Bustillow were present at the crime scene and that Bustillo was the one who took a bat and struck the victim. Testimony of Michele Gutierrez, Tr. 03/17/1998 p. 129-131. Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant. Testimony of Jesse Konstanty, Tr. 3/17/98 p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98 p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98 p. 36.

[38] See testimony of David Bernhard, April 7, 2004. Bernhard testified that in preparing for trial, the defense had difficulty finding evidence to corroborate the existence of an individual named "Sirena" and/or his presence at the Popeye's Restaurant the night Merry was attacked.

as to the presence of Sirena at or near the crime scene the night of the attack.[39]

In addition, Bernhard testified that with Detective Cline's notes and the Mahoney Report in hand – both of which contained references to the "Chelsea Square Apartments" and an individual named "Julio" – he might have "put something together" and determined that the "Julio" referenced in Detective Cline's notes and Julio Osorto referenced in the Mahoney Report were one and the same person, namely Sirena.[40]

Bernhard also testified that the Mahoney Report, which recorded the police stop of Julio Osorto with what appeared to be "ketchup stains" on his shirt, provided evidence of possible blood spatter in contradiction to the Commonwealth's expert testimony in support of a closed head wound. He said that he would certainly have "followed the matter up" further.[41] Even so, Bustillo's expert and lay testimony offered at the hearing failed to place blood on

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[39] *Id.* Bernhard further testified that, at trial, the Commonwealth made several references to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant. Had the defense called Officer Mahoney to the stand to testify in support of its theory that Sirena was the actual assailant, Bernhard testified that this corroboration would have "enhanced" the defense's position.

[40] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived at Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998 state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002 hearing, the Commonwealth argued that it made no connection between the two men and did not nknow that "Sirena", a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[41] Bernhard testified that, absent the Mahoney Report, he purposefully did not question witnesses at trial about Merry's injury or the presence of blood in order to reduce the risk of inflaming the jury.

Sirena or otherwise contradict the Commonwealth's expert testimony. If anything, the evidence was corroborative. In either case, it did not undermine confidence in the jury verdict.

Most importantly, notwithstanding all the information that might have been plumbed from Detective Cline's notes and the Mahoney Report, Bernhard nonetheless testified that he was not certain that either document "would have borne any fruit" or have "changed the outcome" of the trial. In fact, Bernhard testified that, even absent Detective Cline's notes and the Mahoney Report – both of which documented "Sirena" and/or "Julio's" presence at or near the crime scene – he was fully aware of other potential witnesses who could corroborate the existence of Sirena and place Sirena at the scene of the crime, including Jose Armando Amaya.[42] Notwithstanding, Bernhard made a "strategic decision" not to call those witnesses to testify.[43] Bernhard's commendable candor with the Court, especially when coupled with the respect he enjoys from the Court, was instrumental in addressing the fundamental issue presented.

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[42] In his letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney, Todd Sanders, informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats." In the same letter, Sanders also disclosed that "Sirena" was also known as "Julio".

[43] Bernhard testified that he was aware of several witnesses with "dubious credibility" who might have corroborated Sirena's existence and presence at the scene, but that the defense decided against calling such witnesses at trial, in particular Jose Armando Amaya, who had been detained by the authorities. Bernhard testified that he was "instructed by his client" not to talk to Jose Amaya, and that the defense viewed him as an "evidentiary threat," fearing that he would work with the prosecution in exchange for his freedom.

## CONCLUSION

The jury, having heard evidence in support of both theories – that the assailant was either Bustillo or Sirena/Senior Julio – believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury.[44]

Upon a complete review of the entire record and a full consideration of the evidence presented on the issue of materiality, the Court finds that Bustillo failed to demonstrate a reasonable probability that the disclosure and use of either Detective Cline's notes and/or the Mahoney Report would have resulted in a different outcome at trial. Even accepting fully evidence that the victim suffered an open head wound and bled at the moment of impact, there is no evidence of any transfer of the victim's blood to the assailant. As a result, the materiality of the undisclosed evidence is simply absent.

In addition, although Detective Cline's notes and the Mahoney Report, if produced prior to trial, might have provided additional avenues for the defense to explore and perhaps bolster its theory that Sirena was the actual assailant, Bernhard conceded that, notwithstanding the nondisclosure of the police notes and report, the defense was aware of other witnesses with knowledge about Sirena, but made a strategic decision not to call them at trial. More importantly, as previously noted, Detective Cline's notes place Bustillo at the scene, a fact plainly at variance with Bustillo's alibi defense. Simply put, nothing was presented that suggests that the result of the original trial might have

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[44] *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is net entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

been different. Evaluating the case in context with the entire record, including the omitted evidence, the Court does not find that the jury would have entertained a reasonable doubt regarding Bustillo's guilt.

For these reasons, the Petition for Habeas Corpus Relief is denied.

An Order is enclosed.

Very truly yours,

/s/

R. Terrence Ney

## APPENDIX C

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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Law No. 201879

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MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON
Respondent.

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**FINAL ORDER**

This matter came before the Court on April 7, 2004 pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence that the Commonwealth failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

For the reasons stated in this Court's opinion letter dated May 4, 2004, which is attached hereto and made a part hereof, the Petition for Habeas Corpus Relief is DENIED.

This Order is FINAL. The Court notes the Petitioner's exceptions to this Order.

ENTERED this 4th day of May, 2004.

/s/

JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

## APPENDIX D

## CIRCUIT COURT OF FAIRFAX COUNTY

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MARIO A. BUSTILLO

v.

GENE M. JOHNSON AND
RONALD J. ANGELONE

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September 16, 2003

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Case No. (Law) 201879

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* * * * *

BY JUDGE R. TERRENCE NEY

This matter came before the Court pursuant to the Petitioner's Motion to Reconsider the Court's Order of February 21, 2003, whereby the Court denied the Petition for Habeas Corpus Relief.

*Facts*

On December 10, 1997 John Merry was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Petitioner Mario Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998, Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied by the Court of Appeals of Virginia on April 11, 2000. Bustillo next appealed to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Bustillo's writ of certiorari on June 4, 2001.

Bustillo subsequently filed a Petition for a Writ of Habeas Corpus in the Fairfax Circuit Court claiming, among other things, that the Commonwealth had engaged in several acts of prosecutorial misconduct.[1] Specifically, Bustillo alleged that the Commonwealth:

1. Failed to disclose exculpatory evidence;

2. Engaged in improper and suggestive witness coaching;

3. Threatened and intimidated witnesses in exchange for incriminating testimony;

4. Failed to inform Petitioner of his Vienna Convention rights;

5. Had improper contact with a member of the jury; and

6. Prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required with respect to whether certain evidence, namely a videotape and photograph of an individual named "Sirena" who the defense claimed was responsible for the crime, was in the possession of the Commonwealth and, if so, whether such evidence was exculpatory in nature. The Petition with respect to all other issues raised was denied.

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[1] Petitioner also raised the claim of ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002, evidentiary hearing.

An evidentiary hearing on the issues of the videotape and photograph was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[3] made by the Petitioner, including:

1. The production of the photograph of "Sirena" by the Commonwealth, if found;

2. The identity of any official of the Fairfax County Police Department, the investigative, or prosecution team who possessed it;

3. Any information possessed by the Fairfax Police Department pertaining to "Sirena," a.k.a. Julio Cesar Osorto Herrera; and

4. The investigative notes of Fairfax County Police Detective Richard J. Cline.

Pursuant to these discovery orders,[4] the Commonwealth produced to counsel for Bustillo a photograph of "Sirena," a copy of Detective Cline's notes of an interview with witness Jose Armando Amaya ("Amaya") dated January 7, 1998,[5] and a copy of Fairfax County Police Officer C. J. Mahoney's investigative report dated December 10, 1997, documenting

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[3] See this Court's Orders dated October 2, 2002, and November 15, 2002.

[4] *Id.*

[5] The notes of Detective Cline contain scattered references to "Sirena" as a person present at the scene. According to Detective Cline's notes dated January 7, 1998, Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. # 3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997, contain the following notation: "Sirena Julio" as being one of the persons present at the scene.

his stop of an individual named Julio Osorto.[6] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, the Court heard evidence regarding the videotape and photograph of "Sirena," and, in particular, when the Commonwealth obtained such evidence. Finding that neither the videotape nor the photograph were obtained by the Commonwealth during the investigation or prosecution, but rather were obtained post-trial,[7] and, as a result, the Commonwealth had no obligation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), to turn over the videotape or the photograph to the defense, the Court denied the Petition for a Writ of Habeas Corpus. After hearing evidence, the Court took the matter under advisement. The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on the evidence furnished to the Petitioner by virtue of the discovery orders, in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

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[6] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[7] In a sworn affidavit dated April 29, 2002, Officer Abraham Gelabert testified that he "found the photograph [of Sirena] after trial." In addition, the evidence before the Court demonstrated that the videotape was initially procured by Petitioner's counsel and was subsequently furnished to the Commonwealth on March 5, 1999, almost one year *after* the trial.

On March 13, 2003, the Court issued a Suspending Order tolling the running of the twenty-one day period in order to conduct a further review of the matter.

*Analysis*

The issue before the Court is two-fold, namely whether Detective Cline's notes and/or Officer Mahoney's Report constitute exculpatory evidence, and if so, whether the disclosure of such evidence to the defense would have resulted in a different outcome at trial.

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

Evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Id.*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919).

A petitioner has the burden of showing that, when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's

guilt. *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990). Thus, in order for Bustillo to be granted habeas corpus relief, this Court must find that (1) the Mahoney Report and/or Detective Cline's notes constitute exculpatory evidence and (2) the exculpatory evidence is material.

*Exculpatory Nature of the Mahoney Report and Detective Cline's Notes*

Under *Brady*, exculpatory evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Bagley*, 473 U.S. at 676.

Bustillo argues that prior to the 1998 trial, the Commonwealth's Attorney was well aware of the defense's theory that someone other than Bustillo, namely "Sirena," a.k.a. Julio, had committed the murder of John Merry. Indeed, that was the thrust of the defense case. Bustillo further alleges that not only was the Commonwealth fully aware that "Sirena" also went by the name of "Julio,"[8] but that the Commonwealth was also made aware that "Sirena" and Julio *Osorto* were one and the same person through Officer Mahoney's Report and Detective Cline's interview notes.[9] In addition, the Commonwealth was certainly aware

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[8] In a letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney Todd Sanders disclosed that "Sirena" was also known as "Julio," but did not further identify the latter.

[9] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived in Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998, state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002,

that Merry's blood was found at the scene where he had been assaulted.

Hence, Bustillo argues that Detective Cline's notes, in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cocked" bat,[11] and the note documenting the Chelsea Square Apartment address,[12] and Officer Mahoney's Report, which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission, must be deemed exculpatory. Notwithstanding the Commonwealth's alleged inability to equate "Sirena" with Julio Osorto prior to trial, the Petitioner asserts that the contents of the Mahoney Report and Detective Cline's notes, standing alone, are exculpatory, thereby requiring their disclosure prior to trial.

1. *Julio Osorto – Sirena*

Although not the prime focus of the December 5, 2002 evidentiary hearing, the testimony suggested that the police may not have known prior to trial that "Sirena," the individual referenced by Amaya during his interview with Detective Cline and later identified by others as the assailant,[13] and Julio Osorto, the individual stopped by

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hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena," a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[10] See Detective Cline's notes of an interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Amaya dated January 7, 1998.

[12] See note 9, *supra*.

[13] At the post-trial hearing for a new trial held on July 13, 1998, several witnesses came forward and testified that "Sirena" was the assailant. See Testimony of Giovany Hernandez, Tr. 07/13/98, p. 20; Testimony of Marvin Escobar, Tr. 07/13/98, pp. 40-43; Testimony of Jose Maldonaldo, Tr. 07/13/98, pp. 56, 57.

Officer Mahoney near the crime scene the night Merry was assaulted, were one and the same person. Nor would any reasonable police officer necessarily have made the connection with the facts available to them at the time.[14] Although Amaya referenced an individual named "Julio" during his interview with Detective Cline,[15] nowhere in Detective Cline's notes is "Julio" identified as "Julio Osorto."[16] As such, the Commonwealth testified that it had no reason to suspect or believe prior to trial that either the Mahoney report or those portions of Detective Cline's notes referencing "Julio," standing alone, were exculpatory in nature. The Commonwealth is charged with knowledge of what was contained in *both* reports. *Fitzgerald v. Bass*, 6 Va. App. 38, 50, 366 S.E.2d 615, 622 (1988) (constructive knowledge is attributed to the prosecutor where the information is in possession of the police) (citations omitted).

Turning to the specific evidence, the Commonwealth was certainly aware that Detective Cline conducted several pretrial interviews with various eyewitnesses, as the Commonwealth had Detective Cline testify at trial regarding his interviews with witnesses who had identified

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[14] As the evidence presented at the December 5, 2002, hearing demonstrated, the police did not even have in their possession a photo of "Sirena" until months after the trial. After-discovered evidence does not constitute a basis for habeas relief. *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988).

[15] See *supra*.

[16] Petitioner's contention that reference to the Chelsea Square Apartments in both the Mahoney Report and Detective Cline's notes serve to put the Commonwealth on notice that "Sirena" and Julio Osorto were one and the same person, thus rendering the Mahoney Report and Detective Cline's notes exculpatory, is not dispositive. Two persons listing the same address as their place of residence does not necessarily dictate that such persons are one and the same. Certainly more than one person may occupy a particular residence at the same time.

Bustillo as the assailant. The Commonwealth was also aware of Detective Cline's pretrial interview with Amaya, as the Assistant Commonwealth Attorney summarized the contents of that interview in a letter sent to defense counsel prior to trial.

Similarly, the Commonwealth knew, or is charged with knowing, of the existence of the Mahoney report prior to trial. Yet the Commonwealth offered no explanation as to why Detective Cline's notes or the Mahoney Report were not produced to defense counsel other than the argument that the information contained within Detective Cline's notes and the Mahoney Report was not exculpatory.

The Commonwealth should have known, given the contents of the investigative notes and the police report, that "Sirena-Julio" and Julio Osorto might be one and the same person. Both the Mahoney Report and Detective Cline's notes unquestionably implicate "Sirena," a.k.a. Julio, and "Julio" Osorto, as a possible suspect. The Commonwealth should have made the connection, especially given the defense's insistence that "Sirena"/"Julio" was the assailant.

Moreover, although the Commonwealth disclosed to the defense prior to trial that Sirena was observed at the scene the night Merry was assaulted and that "Sirena's first name appears to be Julio,"[17] it failed to disclose that Amaya also told Detective Cline that he observed Sirena holding a bat in a "cocked" position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant.

As such, evidence that "Sirena-Julio" was observed approaching the victim and holding a bat in a "cocked"

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[17] In his letter to defense counsel dated March 9, 1998, Sanders informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats."

position and evidence that an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing must be deemed exculpatory.

2. *Stop of Julio Osorto*

With respect to the "ketchup stains" observed on Julio Osorto's clothing and referenced in the Mahoney Report, the evidence presented at trial was unclear as to a finding of blood *spatter* at the time Merry was struck. The Commonwealth's uncontradicted expert testimony at trial demonstrated that the fatal blow to the victim's head resulted in a closed head wound.[18] Yet the evidence also showed that there was blood at the scene,[19] including photographic evidence of what appeared to be blood spatter.

Given all of the evidence presented at trial concerning the nature of the victim's injury, which admittedly includes the absence of blood on the victim, the absence of blood on the bats, and the absence of blood on Bustillo, but yet with photographs of the crime scene depicting what appears to be blood spatter, and testimony identifying "Sirena-Julio" as the assailant, the Court finds that the information contained within Mahoney's Report, namely the stopping of

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[18] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98, p. 131 (Michelle Gutierrez); Tr. 3/18/98, p. 222 (Jesse Konstanty); Tr. 3/18/98, p. 264 (Nicholas Parada); Tr. 3/18/98, p. 27 (Valeria Landaeta); Tr. 3/18/98, pp. 100, 111 (Amilcar Amaya); Tr. 3/18/98, p. 142 (Christina Hondoy). In addition, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98, p. 193.

[19] Dr. Frances Field further testified that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear then out of the ear canal. Tr. 3/17/98, p. 193.

a "Julio" near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature warranting its production to the defense prior to trial.

*Materiality of the Mahoney Report and Detective Cline's Notes*

Notwithstanding the exculpatory nature of Detective Cline's notes and the Mahoney Report, a new trial is not automatically required whenever * * * "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S. Ct. 763 (1972). In other words, the Petitioner still must establish the materiality of such evidence.

As previously stated, implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. *Bagley*, 473 U.S. at 676. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-10. Rather, evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the trial would have been different. *Id.*, 255 Va. at 464, 499 S.E. at 519, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In further defining the materiality standard, the *Strickland* Court explained that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have

had a reasonable doubt respecting guilt." 466 U.S. at 695. In determining whether Bustillo has established a "reasonable probability" that disclosure of Detective Cline's notes and/or the Mahoney Report to the jury would have [a]ffected the outcome of the trial, the Court considers the exculpatory evidence in context with the existing record.

First, although there is no manifest connection between the "Julio" stopped by Officer Mahoney and the assault of John Merry, Bustillo has shown that Julio Osorto was present in the general vicinity of where the crime occurred, near the time of the assault, with what appeared to be "ketchup stains" on his shirt and pants. Additionally, both Officer Mahoney's notes and Detective Cline's notes reference the Chelsea Square Apartments with respect to "Julio's" reported residence.

Second, in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a "Sirena," the jury would still have to disregard the substantial evidence presented at Bustillo's criminal trial that Bustillo was the assailant.

For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrrez testified that both "Sirena" and Bustillo were present at the crime scene[20] and that Bustillo was the one who took a bat and struck the victim.[21] Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant.[22]

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[20] Testimony of Michele Gutierrez, Tr. 03/17/1998, p. 129.

[21] *Id.*, Tr. 03/17/98, p. 131.

[22] Testimony of Jesse Konstanty, Tr. 3/17/98, p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98, p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98, p. 36.

In addition, Detective Cline testified about his pre-trial interview with Nicholas Parada ("Parada"),[23] who was present at the scene the night of the assault. Parada told Detective Cline that he observed "[Bustillo] standing there with a bat and the victim had fallen to the ground."[24] Detective Cline further testified that when he interviewed Parada on December 18, 1997, Parada told him that he actually saw Bustillo "swinging the bat . . . he saw the bat swinging and he saw the person drop to the floor or to the ground. But [Parada] did indicate that he didn't actually see him strike the victim [although] he did see him swinging the bat in that direction." Testimony of Detective Cline, Tr. 03/18/98, p. 52. Detective Cline also stated that among all the people he interviewed at the crime scene the evening of the assault, "Mario" was the only one everybody identified as having swung the bat. Tr. 03/18/98, p. 53.

Petitioner points out that Nicholas Parada testified at trial that, although he did not see the assault, he did see Bustillo swing the bat in the direction of the victim. Tr. 03/17/98, p. 271. Petitioner contends that this observation recounts precisely the same act as that reported by Amaya in his interview with Detective Cline on January 7, 1998, which Amaya attributed to Sirena.

The jury, however, also heard testimony during the trial implicating "Sirena" as the assailant. Testifying for the defense, Amilcar Amaya[25] stated that he was outside the Popeye's when he saw "Senior Julio"[26] *also known as*

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[23] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[24] Testimony of Detective Cline, Tr. 03/18/98, p. 51.

[25] Amilcar Amaya is not the same person as Jose Armando Amaya referred to in Detective Cline's notes dated January 7, 1998.

[26] Amilcar Amaya indicated that he did not know "Julio's" last name.

"*Sirena*" take a bat and strike the victim.[27] Esmirna Hondoy also testified that she was at Popeye's and witnessed the assault. Although she could not identify the assailant, she testified that Bustillo was *not* the one who attacked the victim.[28]

The jury, having heard evidence in support of both theories, that the assailant was either Bustillo or Sirena/Senior Julio, believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

Notwithstanding, the Court, in addressing the materiality issue on habeas review, must consider what defense counsel could have done or might have done differently had Detective Cline's notes and/or the Mahoney Report been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury. *Evans-Smith v. Taylor*, 30 Va. Cir. 116 (Loudoun County, 1993).

With respect to the first aspect, it is reasonable to assume that, had the defense known about Amaya's statement

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[27] Testimony of Amilcar Amaya, Tr. 03/18/98, p. 99, 100-01, 110-11.

[28] Testimony of Esmirna Hondoy, Tr. 03/18/98, p. 142-43). Officer Bayliss, who was also called to testify for the defendant and was the first officer to arrive at the Popeye's the night of the crime, stated that when he spoke with Hondoy that night, she told him that the assailant was "Mario" and that Mario took the bat from another individual named Lisandro Parada. Testimony of Officer Bayliss, Tr. 03/18/98, p. 185. Detective Cline gave similar testimony in rebuttal. Testimony of Detective Cline, Tr. 03/18/98, p. 189.

to Detective Cline regarding his observation of Sirena's holding a "cocked bat" and the police stop of Julio Osorto on the night of the assault, then the defense would have sought to have had Amaya, Officer Mahoney, and Julio Osorto testify on its behalf. Alternatively, in the event that such witnesses were unavailable to testify, defense counsel may have sought to have had Detective Cline's notes and/or the Mahoney Report introduced into evidence at trial to further support the defense theory that Julio/Sirena, not Bustillo, was the actual assailant. The Court does not opine on the admissibility of either Detective Cline's notes or the Mahoney Report and in particular whether such reports, if deemed hearsay, would fall under any of the exceptions to the hearsay rule.

Furthermore, with respect to the "ketchup stains" referenced in the Mahoney Report, the trial record is devoid of evidence that the victim suffered an open-head wound or testimony as to blood spatter, save the photographic evidence of what appeared to be blood at the scene. But Officer Mahoney's observations of "what appeared to ketchup on [Julio Osorto's] pant legs and a little on his shirt," when coupled with the photographs, tend to belie the evidence presented in support of the Commonwealth's closed head wound theory. With the Mahoney Report in hand, the defense might have further developed its theory of the case, namely, that the victim suffered an open head wound at the moment of impact and that the wound resulted in the transfer of the victim's blood to the assailant.

Third, the Court has to consider the effect that Detective Cline's notes, in particular Amaya's statement, and the Mahoney Report would have had on the result of the trial had such evidence been presented to the jury. While certainly arguable either way, additional corroborating witnesses for the defense might have bolstered its theory

that Sirena was the actual assailant.[29] In addition, evidence of what may have been blood on Julio Osorto might have cast doubt not only on the Commonwealth's closed head wound theory, but also on Bustillo's guilt.

*Conclusion*

Upon review of the entire record and a full consideration of the issues, the Court finds that the information contained within Officer Mahoney's Report and the information contained within Detective Cline's notes, documenting Julio Osorto/Sirena's presence and actions at the crime scene, are exculpatory and thus should have been disclosed to the defense prior to trial.

As to whether the notes of Detective Cline and Officer Mahoney show a reasonable probability that, had such evidence been disclosed to the defense, the result of the criminal trial might have been different, the Court is unwilling at this time to set aside the verdict and order a new trial absent further evidence as to such a probability. In order to properly determine whether disclosure of the police investigative notes and report to the jury would have affected the outcome of trial, the Court finds that a limited hearing on the issue of materiality is warranted in determining whether Bustillo has established that he is entitled to habeas relief.

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[29] As the Petitioner points out, Amaya's testimony certainly would not have been cumulative, as there was only one other defense witness (Amilcar Amaya) to inculpate Sirena as the assailant. In addition, the Commonwealth referred more than once in closing argument to the fact that the defense produced only one eyewitness to name the assailant in comparison to the several witnesses identifying Bustillo as the assailant. The Petitioner argues that Amilcar Amaya's testimony was ultimately rejected by the jury because of the lack of any corroborating witnesses.

The Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending further proceedings.

*Order*

This matter came before the Court pursuant to Petitioner's Motion for Reconsideration of this Court's February 21, 2003, Order, whereby the Court denied the Petition for a Writ of Habeas Corpus subsequent to a limited evidentiary hearing held on December 5, 2002. On March 13, 2003, the Court entered a Suspending Order tolling the running of the twenty-one day period to conduct a further review of the matter. For the reasons stated in this Court's opinion letter dated September 16, 2003, which is attached hereto and made a part hereof, the Petitioner's Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending a limited evidentiary hearing on the issue of materiality.

## APPENDIX E

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

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Law No. 201879

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MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

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**FINAL ORDER**

THIS CAUSE is before this Court on Petitioner's Application for a Writ of Habeas Corpus. Upon consideration of that petition, the motion to dismiss filed by the respondent and the authorities cited therein, the Court, by memorandum opinion and order dated August 8, 2002, ordered an evidentiary hearing limited to the question whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It granted respondent's motion to dismiss all remaining claims.

After mature consideration of the foregoing and of the evidence presented at the evidentiary hearing on December 5, 2002, and a review of the record in the criminal case of *Commonwealth v. Mario Bustillo*, Case No. CR-93337, which is hereby made a part of the record in this habeas corpus matter, the Court finds for the reasons stated to the record at the evidentiary hearing that the

petitioner is not entitled to the relief sought. The Court concludes that the Commonwealth did not violate the petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and grants respondent's motion to strike the evidence.

This Court incorporates by reference the August 8, 2002 memorandum opinion and order and its order of October 3, 2002 amending the memorandum opinion.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to petitioner, John C. Kiyonaga, Esq., the respondent, and H. Elizabeth Shaffer, Assistant Attorney General, and Stephen R. McCullough, Assistant Attorney General.

Entered this 21 day of February, 2003.

/s/

R. Terrence Ney, Judge

## APPENDIX F

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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Law No. 201879

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MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

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**MEMORANDUM OPINION**

This case is before the Court on Petitioner's Application for a Writ of Habeas Corpus pursuant to § 8.01-654 *et seq.* of the Code of Virginia.

On January 20, 1998, a Fairfax County grand jury indicted Mario Bustillo (hereinafter Petitioner) for first degree murder. On March 20, 1998, a jury found Petitioner guilty of first degree murder and sentenced him to thirty (30) years in the penitentiary. On June 12, 1998, Petitioner made a motion to set aside the verdict. After an evidentiary hearing, Judge Gerald Bruce Lee denied Petitioner's Motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied on April 11, 2000. Petitioner then appealed the case to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court

denied Petitioner's writ of certiorari on June 4, 2001. This Petition follows.

Petitioner claims that the Commonwealth engaged in several acts of prosecutorial misconduct. Petitioner also contends that his trial counsel was so ineffective as to amount to a violation of the protections afforded to him by the United States Constitution.

## I. FACTS OF THE UNDERLYING CONVICTION AND APPEAL

The evidence in the underlying criminal action revealed that on or about the night of December 10, 1997, James Merry was struck in the head by another young man with a baseball bat in the parking lot of a Popeye's Restaurant in Springfield, Virginia. Merry died several days later. The Petitioner was later arrested and charged with murder based on the statements of several individuals who witnessed the incident.

At trial, each witness identified Petitioner as the assailant based on their past knowledge of him from the local high school and their recollection of the assailant's clothes that night--a red sweater or jacket. Additionally, the Commonwealth produced witnesses linking Petitioner to a group of Hispanic men who allegedly belonged to a gang called the "Commerce Street Locos."

Petitioner's evidence consisted of six witnesses, including a female who was standing next to the decedent when he was struck. She testified that Petitioner was not the assailant. Additional defense witnesses corroborated her testimony and further indicated that another individual named "Sirena" was responsible for the assault.

## II. PROSECUTORIAL MISCONDUCT

Petitioner's first claim is prosecutorial misconduct. He specifically alleges the following:

(1) The Commonwealth failed to disclose exculpatory evidence;

(2) The Commonwealth engaged in improper and suggestive witness coaching;

(3) The Commonwealth threatened and intimidated witnesses in exchange for incriminating testimony;

(4) The Commonwealth failed to inform Petitioner of his Vienna Convention rights;

(5) The Fairfax County Police had improper contact with a member of the jury; and

(6) The Commonwealth prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

## III. LEGAL ANALYSIS

Petitioner alleges in essence that the Commonwealth engaged in a course of prosecutorial misconduct consciously calculated to convict the wrong defendant. However, many of Petitioner's prosecutorial misconduct claims are procedurally barred. The seminal case establishing the standard of review in a habeas corpus proceeding states that a habeas petition is not an appellate substitute. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975). When claims are available or are adjudicated at trial or on appeal, a Petitioner may not raise the issues again in a habeas corpus petition. *Id.* at 29-30.

Specifically, Petitioner contends that the Commonwealth, including the Fairfax County Police Department, wrongly suppressed exculpatory evidence and engaged in unlawful and prejudicial conduct. However, Virginia law precludes Petitioner from litigating or relitigating claims that could have been raised and argued at trial or during the appellate process. *See Slayton*, 215 Va. at 29-30. In

addition, "absent a change of circumstances, previous determination of the issues by . . . state . . . courts will be conclusive" in a habeas review. *Hawks v. Cox*, 211 Va. 91, 95 (1970). Moreover, prisoners are denied further relief if they state no new claims or try to reengage allegations that were resolved against them in the appellate process. *Id.*

Petitioner also urges that numerous witness recantations, evidence of alleged perjured testimony, and recently altered witness recollections be admitted to prove his innocence. However, the existence of newly discovered evidence arguably relevant to guilt is not a ground for habeas relief, and may not be considered by the Court. *See Fitzgerald v. Bass*, 6 Va. App. 38, 46 (1988) (witness recantations not a basis for relief).

**A. Exculpatory Evidence Claim**

The standard of review applicable to allegations of wrongful suppression of exculpatory evidence is rooted in the case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). If evidence favorable to a defendant is material to the defendant's guilt, regardless of the prosecution's good or bad faith intention, withholding of that evidence potentially violates due process. *Id.* at 87. The Supreme Court further crafted a "materiality standard" for courts to apply in analyzing claims of allegedly withheld exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. To determine the amount of potential prejudice that the withheld evidence caused during trial, courts in Virginia assess the reasonable probability of a different trial result, taking into account the difficulties of trying to envision how the defense would have proceeded at trial had the evidence

been disclosed. *See Robinson v. Commonwealth*, 231 Va. 142, 152 (1986).

Petitioner claims that the exculpatory evidence the Commonwealth allegedly withheld at trial and during discovery would have created reasonable doubt with respect to the identity of the assailant. Petitioner's burden is to demonstrate that, in light of the entire record, the omitted evidence would have provided the jury with a basis for reasonable doubt as to his guilt. *See Soering v. Deeds*, 255 Va. 457, 464 (1998). "Evidence proffered by an accused that merely suggests a third party *may* have committed the crime charged is inadmissible; only when proffered evidence tends *clearly* to point to some other person as the guilty party will such proof be admitted." *Id.* (citing *Karnes v. Commonwealth*, 125 Va. 758, 766 (1919) (emphasis included).

The record reveals that defense counsel targeted another man named "Sirena," whose real name is Julio Cesar Osorto, as the true assailant, but failed to produce any probative evidence of this man's existence. Petitioner asserts that the Commonwealth possessed a photograph and videotape of Osorto. The videotape allegedly shows Orsorto confessing to the crime following his flight to Honduras, thus linking him, at least, to the scene of the crime. The record is unclear as to if and when the Commonwealth possessed the alleged photograph and videotape.

Petitioner's claim that the Commonwealth withheld the photo and videotape may have merit if the Commonwealth had the items in its possession and failed to disclose the evidence before or during trial. Respondent's assertion that the *Brady* standard does not apply if the evidence in dispute was available to defendant from other sources fails in this instance if Petitioner lacked knowledge of its existence at the time of trial. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787

F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852 (1986)). In that case, Petitioner would not have had such a claim available during trial or his series of appeals that followed.

The record appears to support Petitioner's claim that he had no knowledge of the pictures or videotape at trial, thus making them unavailable through any means other than disclosure by the Commonwealth. Assuming, *arguendo*, that the Commonwealth did have such evidence at the time of trial, a colorable argument exists that both the *Brady* and *Bagley* standards may be satisfied and that there is a serious question as to reasonable doubt under *Soering*. Therefore, it is the Court's opinion that an evidentiary hearing is necessary to determine whether the Commonwealth possessed the photo and videotape, and whether such possession was at a time in which disclosure would have been beneficial to Petitioner.

While Petitioner's first claim concerning exculpatory evidence warrants further examination, his remaining claims of prosecutorial misconduct must be dismissed. In his petition, Petitioner makes numerous claims that the Commonwealth improperly coached witnesses; threatened witnesses with deportation and prosecution; tampered with the jury; failed to inform Petitioner of his Vienna Convention rights; and wrongly promoted the unsubstantiated claim that Petitioner was a "gang" member in order to inflame the jury. Despite the breadth and details of these claims, they are all procedurally barred by the *Slayton* and *Hawks* holdings. Because these claims were available to Petitioner during trial and through the appellate process, the Court does not reach the merits of those claims in the instant proceeding.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next challenges the effectiveness of the assistance of his trial counsel. His allegations consist of the following:

(1) His attorney failed to produce exculpatory witnesses;

(2) His attorney failed to timely object to certain testimony offered by the Commonwealth;

(3) His attorney failed to object to the Commonwealth's continued references to Petitioner's gang affiliation;

(4) His attorney failed to inform him of his Vienna Convention rights to meet with the Honduran Consulate; and

(5) His attorney's relationship with a police officer assigned to the case presented a conflict of interest.

## V. LEGAL ANALYSIS

The standard two-prong analysis for analyzing inadequate assistance of counsel claims in habeas corpus petitions was set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a Petitioner must show that trial counsel made errors so egregious as to implicate Petitioner's fundamental Sixth Amendment rights. Secondly, Petitioner must show that counsel's errors prejudiced the defense so seriously that counsel's performance compromised Petitioner's right to a fair trial. *Strickland*, 466 U.S. at 687; *Curo v. Becker*, 254 Va. 486 (1997). Petitioners must overcome high hurdles in challenging trial counsel's trial tactics because great deference is given to counsel's judgment and decisions. *Strickland*, 466 U.S. at 690. Attorneys are presumed to have made decisions and acted with reasonable professional judgment. *Id.* at 690-91.

In a collateral attack on a conviction, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes v. Warden*, 226 Va. 111, 118 (1983); *accord Strickland*, 466 U.S. at 687. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

In applying the *Strickland* test, a Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695; *accord Strickler v. Murray*, 249 Va. 120, 128, *cert. denied*, 516 U.S. 850 (1995).

It is obvious that trial counsel in the immediate case maintained a consistent, yet unsuccessful strategy. However, "effective" representation is not synonymous with "successful" representation. *See Peyton v. Ellsyon*, 207 Va. 423, 426-27 (1966). The question is whether trial counsel's failure to produce certain witnesses, note timely objections, counter evidence of gang affiliation, or raise the alleged conflict effectively denied Petitioner his constitutional right to assistance of counsel. A review of the record in its entirety revealed that trial counsel's presentation of Petitioner's case did not fall below the acceptable level of representation of a defendant. Moreover, the evidence presented by the Commonwealth demonstrated a convincing case of Petitioner's guilt.

**A. Exculpatory Witnesses**

Petitioner contends that his trial counsel failed to adduce testimony from witnesses, perceived to be exculpatory, that in Petitioner's view would have changed the trial's outcome. Counsel is not ineffective for failing to call an unfavorable witness that may weaken, rather than strengthen, a defense. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

The record indicates that trial counsel did not call certain witnesses because Petitioner's father instructed him not to, or the witnesses had provided false statements to police. "[W]hen defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. It appears that counsel's trial strategy was to exclude the witnesses in question because in his opinion they would weaken the defense. Petitioner cannot prove prejudice if counsel declined to call a witness whose credibility was subject to impeachment. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

**B. Objections**

Petitioner further argues that counsel was ineffective for failing to object to portions of the Commonwealth's evidence. Specifically, Petitioner claims that trial counsel should have objected to the medical examiner's testimony about cause of death. However, the record indicates that trial counsel maintained a consistent strategy not to object to testimony that would make it appear he was trying to hide something from the jury. Such reasonable, strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Moreover, it is unlikely that counsel's objection to the medical examiner's opinion would have been sustained.

**C. "Gang Taint"**

Petitioner argues that trial counsel failed to disassociate Petitioner from the taint of gang affiliation and that his questions tended to promote the association. The record reflects that counsel's strategy in navigating the gang overtones in the case was to promote the victim's gang relationship. Petitioner cannot now question this tactic in hindsight, for courts have been reluctant to second-guess trial lawyers' tactics. *See Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977). The *Strickland* test requires the reasonable probability that counsel's errors caused an unreliable trial outcome. *See Strickland*, 466 U.S. at 687. The Petitioner has not proven such probability.

**D. Vienna Convention Rights**

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, the Court's holding in *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975) bars this claim because Petitioner had ample time to raise the issue at trial or on appeal.

**E. Conflict of Interest**

Lastly, Petitioner claims trial counsel allowed a conflict of interest to compromise his representation of Petitioner in violation of Petitioner's Sixth Amendment rights. Petitioner claims that one of the police officers in the case had previously recommended trial counsel's legal services to other members of the community. Petitioner, though, fails to show the alleged conflict of interest actually had an adverse effect on counsel's performance, particularly because the record reflects that counsel had no knowledge of the referrals. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1243-44 (2002) (holding that a defendant must establish that an alleged conflict of interest adversely affected his

counsel's trial performance to demonstrate a Sixth Amendment violation).

## VI. CONCLUSION

In the final analysis, the Court is of the opinion that only one of Petitioner's claims warrants further review. The record is unclear whether the photograph or videotape of Osorto's statement was in the Commonwealth's possession in time to be of value to Petitioner at his trial or for an immediate post-trial proceeding.

If the photograph or video were available, the Court must further determine whether it was in fact exculpatory. These issues will require a limited evidentiary hearing. Therefore, Petitioner's Petition with respect to this issue is granted.

The remaining prosecutorial misconduct and ineffective assistance of counsel claims are barred by Virginia habeas corpus law. Accordingly, the Court grants Respondent's Motion to Dismiss with respect to those remaining claims.

Entered this 8 day of August 2002.

/s/

Henry E. Hudson, Judge

## APPENDIX G

**VIRGINIA:**

**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

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Law No. 201879

---

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

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**ORDER**

THIS CAUSE is before the Court on Petitioner's Application for a Writ of Habeas Corpus. The Court finds that a limited evidentiary hearing is required with respect to whether certain evidence was in the possession of the Commonwealth, and if so, whether that evidence was exculpatory to Petitioner. It is therefore

ORDERED that the Petition is GRANTED only on the issues of determining whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It is further

ORDERED that the Petition with respect to all remaining issues is DENIED.

Entered this 8 day of August, 2002.

/s/
Henry E. Hudson, Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

## APPENDIX H

## CONSTITUTIONAL AND TREATY PROVISIONS

1. The Supremacy Clause of The Constitution of the United States of America, Art. VI, cl. 2, provides in relevant part:

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. The Due Process Clause of the Fifth Amendment to The Constitution of the United States of America provides in relevant part:

* * * * *

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

* * * * *

3. Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, provides in relevant part:

**Article 36**

**Communication and contact with nationals of the sending State**

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national

who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

4. The Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, art. I, 21 U.S.T. 325, provides in relevant part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

(2)

No. 05-51

FILED
SEP 23 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

MARIO A. BUSTILLO,

*Petitioner,*

v.

GENE M. JOHNSON, in his official capacity as Director of the Virginia Department of Corrections,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, create judicially enforceable individual rights?

2. Assuming that the Vienna Convention does create judicially enforceable individual rights, does it also require a state court to ignore its own rules of procedure?

3. Did the state courts properly decide the Petitioner's routine claims under *Brady v. Maryland*, 373 U.S. 83 (1963)?

   a. Does a well-established state court rule – the failure to timely file transcripts – constitute an adequate and independent state procedural bar?

   b. Assuming that there is no adequate and independent state procedural bar, was the prosecution's failure to disclose certain documents material?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| INTRODUCTION | 1 |
| STATEMENT OF THE CASE | 2 |
| 1. Background | 2 |
| 2. Mr. Bustillo's Trial | 4 |
| a. Virginia's Case Against Mr. Bustillo | 4 |
| b. Mr. Bustillo's Defense | 5 |
| c. Post-Trial Motions | 6 |
| 3. The Appeals | 7 |
| 4. State Habeas Corpus Petition | 7 |
| a. The Vienna Convention Claim | 8 |
| b. The *Brady* Claims | 9 |
| 5. Appeal of the Denial of the State Habeas Petition | 11 |
| REASONS FOR DENYING THE WRIT | 11 |
| I. THIS COURT SHOULD DECLINE TO REVIEW THE VIENNA CONVENTION ISSUE | 12 |
| A. Because His Conviction Became Final Before the Announcement of a "New" Rule, the *Teague* Rule Bars Mr. Bustillo's Vienna Convention Claim | 12 |
| B. Because the State Court's Decision Regarding the Vienna Convention Issue Rested Exclusively on State Law, Certiorari Review Is Inappropriate | 14 |

TABLE OF CONTENTS – Continued

Page

C. Because Mr. Bustillo Was Not Prejudiced, the Failure to Follow the Vienna Convention Was Harmless Error ..... 17

1. Obtaining the Photograph Before Trial Would Not Have Altered the Outcome... 18

2. Confirmation of Sirena's Flight Would Not Have Altered the Outcome ..... 21

3. Sirena's "Confession" Would Not Have Altered the Outcome ..... 22

II. THIS COURT SHOULD DENY REVIEW OF THE *BRADY* CLAIMS ..... 23

A. There is an Adequate and Independent State Ground for Dismissal of the *Brady* Claims ..... 24

B. There is No Need to Review the State Court's Resolution of Common *Brady* Claims ..... 26

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

Page

AMERICAN CASES

*Barrett v. Barrett*,
339 S.E.2d 208 (Va. App. 1986) ..... 25

*Brady v. Maryland*,
373 U.S. 83 (1963) ..... *passim*

*Breard v. Greene*,
523 U.S. 371 (1998) ..... 13

*Bustillo v. Virginia*,
532 U.S. 1072 (2001) ..... 7, 13

*Calderon v. Thompson*,
523 U.S. 538 (1998) ..... 27

*Chambers v. Mississippi*,
410 U.S. 284 (1973) ..... 22

*Coleman v. Thompson*,
501 U.S. 722 (1991) ..... 24

*Dodson v. Director*,
355 S.E.2d 573 (Va. 1987) ..... 15

*Dugger v. Adams*,
489 U.S. 401 (1989) ..... 26

*Felker v. Turpin*,
518 U.S. 651 (1996) ..... 16

*Ford v. Georgia*,
498 U.S. 411 (1991) ..... 24

*Henry v. Warden*,
576 S.E.2d 495 (Va. 2003) ..... 15, 25

*Hines v. Virginia*,
117 S.E. 843 (Va. 1923) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*Medellin v. Dretke*,
125 S. Ct. 686 (2004) ..... 1, 12

*Medellin v. Dretke*,
125 S. Ct. 2088 (2005) ..... 1, 13, 23

*Moehring v. Virginia*,
290 S.E.2d 891 (Va. 1982) ..... 21

*O'Dell v. Netherland*,
521 U.S. 151 (1997) ..... 13

*Overton v. Ohio*,
534 U.S. 982 (2001) ..... 27

*Palmer v. Commonwealth*,
609 S.E.2d 308 (Va. 2005) ..... 25

*Roe v. Roe*,
324 S.E.2d 691 (Va. 1985) ..... 25

*Slayton v. Parrigan*,
205 S.E.2d 680 (Va. 1974) ..... 8, 15

*Strickland v. Washington*,
466 U.S. 668 (1984) ..... 9

*Taylor v. Virginia*,
537 S.E.2d 592 (Va. 2000) ..... 21

*Teague v. Lane*,
489 U.S. 288 (1989) ..... *passim*

*Towler v. Virginia*,
221 S.E.2d 119 (Va. 1976) ..... 25

*Turner v. Virginia*,
341 S.E.2d 400 (Va. App. 1986) ..... 25

*Virginia v. Raja*,
Record No. 042846 (Va. July 6, 2005) ..... 25

TABLE OF AUTHORITIES – Continued

Page

*Volt Info. Scis., Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989) ..... 15

*Wolfe v. Virginia*, 371 S.E.2d 314 (Va. App. 1988) ..... 25, 26

CASES FROM THE INTERNATIONAL COURT OF JUSTICE

*Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31) ..... 1, 13, 23

*LaGrand Case (Federal Republic of Germany v. United States)*, 2001 I.C.J. 466 (June 27) ..... 1, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 ..... 16

STATUTES AND TREATIES

*Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 110 Stat. 1217 (1996) ..... 16

*Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 ..... *passim*

*Virginia Code* § 8.01-654(A)(2) ..... 8

*Virginia Code* §§ 8.01-635 through 668 ..... 15

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 10 ..... 27

Sup. Ct. R. 20.4 ..... 16

Virginia S. Ct. Rule 5:11(a) ..... 24

OTHER AUTHORITIES

Letter of March 7, 2005 from the Secretary of State to the Secretary-General of the United Nations announcing that the United States is formally withdrawing from the Optional Protocol of the Vienna Convention on Consular Relations, (available at http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html) (last visited on Sept. 19, 2005) ..... 13

## BRIEF IN OPPOSITION

The Respondent, Gene M. Johnson, in his official capacity as the Director of the Virginia Department of Corrections ("the Director"), through his counsel, Virginia Attorney General Judith Williams Jagdmann, and pursuant to this Court's Order of July 25, 2005 directing that a response be filed, responds to the Petition for a Writ of Certiorari.[1]

## INTRODUCTION

The International Court of Justice has held that the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, creates judicially enforceable individual rights and that American courts must ignore their own procedural rules when enforcing those rights. *See Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31); *LaGrand Case (Federal Republic of Germany v. United States)*, 2001 I.C.J. 466 (June 27). Although this Court granted certiorari to consider the implications of these decisions, *Medellin v. Dretke*, 125 S. Ct. 686 (2004), new developments in that case prompted the Court to dismiss the Writ as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088, 2092 (2005).

Although this Petition presents questions similar to those left unresolved in *Medellin*, it presents an inappropriate vehicle to resolve the issues. First, the rule of

[1] On August 10, 2005, this Court extended the time for such filing to and including September 23, 2005.

*Teague v. Lane*, 489 U.S. 288, 316 (1989), precludes this Court from considering the issue. Second, in deciding the Vienna Convention issue, the lower court did not reach any federal question, but relied exclusively on state law. Third, the failure to follow the Vienna Convention was harmless error. Finally, while the Petition does raise various routine *Brady* claims, those claims are barred by an adequate and independent state ground and are unworthy of this Court's attention.

## STATEMENT OF THE CASE

### 1. Background

On the evening of December 10, 1997, at about 7:30 p.m., James Merry and three friends, Jesse Konstanty, Michelle Gutierrez, and Valeria Landaeta were eating dinner inside a Popeye's restaurant in Springfield, Virginia. Tr. 03/17/98 at 100, 125, 127.[2] Ms. Gutierrez looked out into the parking lot and saw three cars parking. The cars' occupants started pointing at the group. Ms. Gutierrez warned her friends not to leave the restaurant because she thought something was going to happen. Tr. 03/17/98 at 127. Ms. Gutierrez knew these men were members of the Commerce Street Locos, a gang. Tr. 03/17/98 at 148.

[2] Throughout this brief, references to the trial transcript are designated as "Tr. (date of trial) at ___", references to the trial record are designated as "T.R. at ___", references to the habeas record are designated as "H.R. at ___", and references to the Petitioner's Appendix are designated as "*Pet. App.* at ___". Confusingly, some of the habeas exhibits were filed with the trial record, explaining the "T.R." citation.

Shortly thereafter, the men, around fifteen of them, entered the restaurant. Ms. Gutierrez recognized many of these men, including the petitioner, Mario Bustillo, and an individual known to her as "Sirena." Tr. 03/17/98 at 129-30. She believed the men were drunk because their speech was slurred. They threatened Mr. Merry and Mr. Konstanty in Spanish, accusing them of fighting with members of their gang on another occasion. Ms. Gutierrez said they were mistaken, that neither Mr. Merry nor Mr. Konstanty was Hispanic or understood anything they were saying. The group insisted, "[n]o . . . it was him, it was him in the red car." Tr. 03/17/98 at 128. She insisted that they were mistaken because "he drives a blue car." The group looked at each other, after which the petitioner shook Mr. Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." Tr. 03/17/98 at 129. One of them said "We have no problems with you. It's your friend that we want to get an opportunity to meet." Tr. 03/17/98 at 221. They left, and Ms. Gutierrez, who was still nervous, warned her friends to stay in the restaurant. Tr. 03/17/98, at 130.

Nevertheless, Mr. Merry went outside to smoke a cigarette. Meanwhile, the gang members were walking around the parking lot. Tr. 03/17/98 at 131, 239-40. Ms. Gutierrez then saw Mr. Merry lean against a sign and light a cigarette. Tr. 03/17/98 at 157. He appeared to be talking to Cristina Hondoy, who was facing him. Tr. 03/17/98 at 163, 250. An assailant ran up, swung a baseball bat, hit Mr. Merry on the left side of his head, and ran

away. Tr. 03/17/98 at 131, 181. Because of this attack, Mr. Merry died.[3]

The police arrived soon after the attack and questioned a number of individuals. That night police recovered two baseball bats at the scene, fifty to seventy-five yards east of the Popeye's restaurant. Tr. 03/17/98 at 116. Neither bat had blood on it. Tr. 03/17/98 at 108. Mr. Bustillo was the only perpetrator identified to the police. Tr. 03/18/98 at 53, 67-69. The police subsequently arrested Mr. Bustillo and charged him with the murder of Mr. Merry. Although Mr. Bustillo is a citizen of Honduras, the arresting officers failed to advise him that he could contact Honduran consular officials.

## 2. Mr. Bustillo's Trial

### a. Virginia's Case Against Mr. Bustillo

Mr. Bustillo, with the assistance of retained counsel, faced a jury trial on March 17-20, 1998, for the murder of Mr. Merry. At trial, Mr. Konstanty, Ms. Gutierrez, and Ms. Landaeta testified that Mr. Bustillo was the assailant.[4]

---

[3] The blow fractured Mr. Merry's skull in several places. Tr. 03/17/98 at 205. Dr. Frances Field, the medical examiner who examined Mr. Merry's body, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. Tr. 03/17/98 at 193. Following the attack, Mr. Merry's brain continued to swell, shutting down his other organs, and he eventually died after life supports were discontinued. Tr. 03/17/98 at 207.

[4] Moreover, a member of Mr. Bustillo's gang, Nicolas Parada, told the police he had seen Mr. Bustillo strike Mr. Merry with the bat. Tr. 03/17/98 at 265; Tr. 03/18/98 at 51-52. At trial, however, he provided a different version, saying he saw the "kid had fallen down and . . . that Jesse was chasing Mario [Bustillo] and Julio Sirena." Tr. 03/17/98 at

(Continued on following page)